

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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In the Matter of	)	
	)	
Wireless E911 Location Accuracy	)	WT Docket No. 11-117
Requirements	)	
	)	
IP-Enabled Services E911 Requirements for	)	WC Docket No. 05-196
IP-Enabled Service Providers	)	
	)	
Facilitating the deployment of Text-to-911	)	PS Docket No. 11-153
and other NG911 Applications	)	
	)	
Framework for Next Generation 911	)	PS Docket No. 10-255
Deployment	)	
_____	)	

**COMMENTS OF METROPCS COMMUNICATIONS, INC.**

Carl W. Northrop  
Andrew Morentz  
Jessica DeSimone  
Telecommunications Law Professionals PLLC  
875 15th Street, NW, Suite 750  
Washington, DC 20005  
Telephone: (202) 789-3120  
Facsimile: (202) 789-3112

Mark A. Stachiw  
General Counsel, Secretary  
& Vice Chairman  
Garreth A. Sarosi  
Deputy General Counsel  
2250 Lakeside Boulevard  
Richardson, TX 75082  
Telephone: (214) 570-5800  
Facsimile: (866) 685-9618

Its Attorneys

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_____	)	

**COMMENTS OF METROPCS COMMUNICATIONS, INC.**

MetroPCS Communications, Inc. (“MetroPCS”),<sup>1</sup> by its attorneys, hereby respectfully submits its comments in response to the *Public Notice*<sup>2</sup> released by the Federal Communications Commission (the “Commission” or the “FCC”) seeking comment on the *Petition for Declaratory Ruling and/or Rulemaking* filed by Telecommunications Systems, Inc. (“TCS”) in the above-

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<sup>1</sup> For purposes of these Comments, the term “MetroPCS” refers to MetroPCS Communications, Inc. and all of its FCC-licensed subsidiaries.

<sup>2</sup> Public Safety and Homeland Security Bureau Seeks Comment on Petition for Declaratory Ruling and/or Rulemaking filed by Telecommunication Systems, Inc., GN Docket 11-117, WC Docket 05-196, PS Docket 11-153, PS Docket 10-255, DA 13-273, 2 (rel. Feb. 22, 2013).

captioned proceeding on July 24, 2012 (“*TCS Petition*” or the “*Petition*”).<sup>3</sup> In support of the relief TCS is seeking, the following is respectfully shown:

## **I. INTRODUCTION AND SUMMARY**

MetroPCS applauds the Commission for seeking comment on the *TCS Petition*. The *Petition* raises significant and troubling issues vexing the wireless industry regarding the provision of E911 services. Unfortunately, MetroPCS has experienced first-hand the distractions that patent lawsuits regarding E911 can cause, the “significant roadblock” that patent infringement allegations can create, and the potential risk that a district court may mandate damages and/or injunctive relief which could cause E911 services not to be delivered. A prompt resolution of these issues may provide a roadmap that will help the Commission avoid similar problems relating to other existing and future Commission mandates, such as Text-to-911, NG911, and CMAS.

MetroPCS, thus, agrees wholeheartedly with TCS that the Commission must address this issue. There are a number of constructive actions the Commission could take. For example, TCS asks the Commission to issue a Declaratory Ruling that certain aspects of 28 U.S.C. § 1498 are met upon compliance with E911 and NG911 regulations, or in the alternative, to adopt rules or guidance that requires the licensing of certain patents pursuant to reasonable terms and conditions that are demonstrably free of any unfair discrimination. These proposals merit consideration. An alternate approach worthy of consideration is for the Commission to find that (1) because the uninterrupted provision of E911 services is critical to the public interest, a court should not entertain granting injunctive relief for an alleged infringement of a patent pertaining

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<sup>3</sup> Petition of Telecommunication Systems Inc. For Declaratory Ruling and/or Rulemaking , GN Docket No. 11-117, WC Docket No. 05-196, PS Docket No. 11-153, PS Docket No. 10-255 (filed July 24, 2012) (“*TCS Petition*”).

to the provision of the E911 services; and, (2) because E911 services are provided by wireless carriers to the public without charge, wireless carriers obtain no monetary benefit from the use of the patent for the provision of E911 services and thus no monetary damages should be owed for this particular Commission mandated use – but potential monetary damages would remain available for non-E911 claims. Other commenters may have other solutions to this problem as well. The important thing is for the Commission to address this problem now and thereby reduce the possibility that a court may prevent a wireless carrier from providing critical E911 services to the public.

## **II. THE *TCS PETITION* HAS CALLED ATTENTION TO A SIGNIFICANT INDUSTRY ISSUE**

The *TCS Petition* exposes a problem that has been plaguing the telecommunications industry for years. As the *Petition* correctly points out, “Commission mandated E911 regulations have had the unintended consequence of engendering an onslaught of predatory patent litigation.”<sup>4</sup> Specifically, vexatious, patent infringement suits have been filed against providers of E911 services and capabilities whose only “crimes” have been to make a good faith effort to comply with the FCC’s 911 regulations set forth in Section 20.18 of the Commission’s Rules and various agency decisions.<sup>5</sup> MetroPCS can attest, from personal experience, that these

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<sup>4</sup> *TCS Petition*, ii.

<sup>5</sup> The telecommunications industry has a significant number of patents. As a result, wireless telecommunications carriers are beset with numerous patent lawsuits every year. Even though MetroPCS does not manufacture products and does not hold many patents, MetroPCS uses both in-house and outside counsel intellectual property attorneys. Most patent claims against MetroPCS are prosecuted by Non-Practicing Entities (“NPEs”) – sometimes referred to as “Patent Trolls” – who buy patents and then beat them into claims not envisioned by the inventors to bedevil the industry. E911 patent litigation is not unique in that way. What is unique is that the wireless industry has been mandated by the Commission to provide E911 service at no charge. As a result, carriers must defend and pay royalties on services for which they cannot collect any direct revenues. Further, since wireless carriers are required to provide E911

(continued...)

lawsuits have the very real detrimental impact of diverting valuable resources – time, management attention, capital and money – from other more important endeavors. Ultimately, it is the public which suffers the consequences. Due to these repeated lawsuits, which can interfere with a provider’s E911 compliance plan, disruption of E911 services and the potential loss or delay of upcoming NG911 services, may result.

The *TCS Petition* demonstrates that patent infringement suits often are filed by what it calls “patent assertion entities” or “PAEs,” also commonly referred to as Non-Practicing Entities (“NPEs”). NPEs increasingly are asserting that the systems and methodologies that a service provider employs to provide E911 services, such as location-accuracy technology, infringe on one or more claims of the patent-in-suit.<sup>6</sup> However, in a number of instances, these systems and methodologies are necessary for carriers to comply with the Commission’s E911 rules or, in the case of location-accuracy technology, to comply with the E911 Phase II location accuracy requirements.<sup>7</sup> TCS properly characterizes this practice as NPEs simply “[t]aking advantage of the mandatory nature of the Commission’s E911 regulations,” thereby “forc[ing] wireless carriers and E911 service providers (such as TCS), into the dilemma of either facing the unacceptable consequences of violating or being a party to violating FCC licensing standards or be adjudicated as a patent infringer.”<sup>8</sup> Neither option is attractive, and neither option is acceptable. Further, the NPE in certain instances is able to hang the Sword of Damocles over the

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(...continued)

services, this area is a ripe one for vexatious litigation since carriers cannot merely turn off the service to avoid the claims.

<sup>6</sup> See *TCS Petition*, 3.

<sup>7</sup> 47 C.F.R. §20.8(h). See also *In the Matter of Wireless E911 Location Accuracy Requirements*, PS Docket 07-144, FCC 10-176, Second Report and Order (rel. Sept. 23, 2010).

<sup>8</sup> *TCS Petition*, ii.

head of the wireless carrier by threatening injunctive relief that, if granted, would prevent the wireless carrier from meeting its E911 obligations.

In the vast number of cases there is little doubt that the infringement claim lacks substantial merit based on E911 service, but the cost of defending against patent litigation is sufficiently high that wireless carriers often are forced to succumb to the economic reality and make the Hobbesian choice that it might be cheaper to settle a claim than to defend against it.<sup>9</sup> This decision is further clouded by the possibility that the wireless carrier may suffer treble damages in the off chance that a jury agrees with the NPEs' twisted and tortured reading of the patent.<sup>10</sup> This encourages NPEs to twist their patents into odd claims – only tangentially related to the provision of E911 service – in the hopes of extracting a settlement. Indeed, in many cases, NPEs file suits merely to extract settlements – a practice which is frowned upon but seldom denied by the courts.<sup>11</sup> Such abuses of judicial process must not be encouraged or tolerated.

As the *TCS Petition* states, patent infringement suits resulting from compliance with the Commission's E911 rules have targeted not only E911 service providers, but wireless service providers as well. MetroPCS is no exception. MetroPCS has been involved in several patent

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<sup>9</sup> Indeed, a 2011 study by the American Intellectual Property Law Association found that alleged infringers face legal costs in the millions for patent infringement lawsuits. Jim Kerstetter, *How Much is that Patent Lawsuit Going to Cost You?*, CNET, Apr. 5, 2012, [http://news.cnet.com/8301-32973\\_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/](http://news.cnet.com/8301-32973_3-57409792-296/how-much-is-that-patent-lawsuit-going-to-cost-you/).

<sup>10</sup> Furthermore, the information presented in the courtroom may be too technical for the jury to completely comprehend: "What happens in that courtroom is that it's a very technical presentation to a jury that has no technical background . . . In a lot of these cases, the juries say this is above my head, and the judgment goes to the lawyer they like the most." *Id.*

<sup>11</sup> For example, an industry analyst recognized that "[i]t would be in [the NPE's] best interest to play the bulldog and aggressively pursue not only licensing opportunities, but hefty settlements against companies that infringe on the [Company's] patents." Anne Layne-Farrar, *The Brothers Grimm Book of Business Models: A Survey of Literature and Developments in Patent Acquisition and Litigation*, 9.1 J.L. ECON. & POL. 29, 45 (2013) (citations omitted).

infringement suits based in whole or in part on its role as a provider of E911 services, with some suits still pending. In MetroPCS' experience, these lawsuits are not meritorious, but nonetheless are time-consuming, consume substantial management time and attention and require a great commitment of funds and resources that could better be invested in other more important and necessary services. Perhaps most important, these sorts of suits clearly distract carriers from the ultimate end goal: the provision of reliable and accurate E911 services to the public. As such, the Commission should help the E911 community and the wireless service providers stem the tide of these lawsuits which threaten the E911 system.

The *TCS Petition* specifically highlights one of MetroPCS' many experiences with patent infringement allegations in its effort to comply with E911 regulations. In *Tendler Cellular of Texas, LLC v. MetroPCS Communications, Inc. et. al*, Civil Action No. 6:11cv00178 (EDTX) (2012), Tendler claimed that MetroPCS infringed on several patents issued for a "Location Based Information System" due to its provision of E911 services and its MetroNavigator System.<sup>12</sup> MetroPCS and TCS responded to this allegation by denying any direct infringement through the "manufacture, use, sale, importation, and/or offer for sale of its systems providing location based services, including by not limited to its ***government mandated provision of E911 services*** and MetroNavigator services."<sup>13</sup> Ultimately the case was settled despite the MetroPCS view that it ultimately could have prevailed on the merits. The bottom line was that MetroPCS and its E911 vendor incurred substantial costs arising out of Commission-mandated obligations. In instances such as this where compliance with E911 requirements is mandated, the

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<sup>12</sup> Complaint, filed by Tendler Cellular of Texas, LLC, ¶¶ 8, 10, 14 (04/11/2011); *TCS Petition*, 3-4.

<sup>13</sup> Answer to Amended Complaint, filed by MetroPCS Communications Inc., MetroPCS Wireless, ¶ 17 (10/24/2011) (emphasis added).

Commission must ensure that carriers are not subject to suit simply by virtue of their compliance. Any other result would be unjust and could threaten the ubiquity of the E911 system and harm the public interest.

Unfortunately, the *Tendler* case was not the only instance of E911 patent infringement allegations against MetroPCS. MetroPCS also fell victim to another lawsuit, *Emsat Advanced Geo-Location Technology, LLC and Location Based Services LLC vs. MetroPCS Communications, Inc., et al.*, 2:08-CV-381 (EDTX) (2010). In *Emsat*, the plaintiffs claimed infringement on several patents which “allow for increased accuracy in determining the location of a mobile phone for the purpose of transmitting location information to nearby emergency call centers, known as [PSAPs].”<sup>14</sup> Again, this patent suit stemmed, in part, from MetroPCS’ provision of E911 services through location-based information system – a system that is critical to public safety and the provision of E911 services. The E911 claims in this suit were particularly spurious. The evidence indicated that the original patent claims would not have read on E911 service. But, when the Commission mandated E911 services, the inventors added E911 services as a possible use in a transparent attempt to take advantage of the Commission’s E911 mandate. Again, while MetroPCS believed that the patent claims lacked substantial merit as to E911 services, after several years of defending against the action and millions of dollars of legal expense, the action was eventually settled as to MetroPCS and its E911 vendor.

In both of the above described cases, MetroPCS spent significant time engrossed in litigation and committed substantial resources and funds to defend against these actions all because of its *bona fide* effort to comply with the Commission’s E911 rules and ensure that its

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<sup>14</sup> Complaint, filed by Emsat Advanced Geo-Location Technology, LLC and Location Based Services LLC, ¶ 13 (10/07/2008).

customers and the public as a whole were provided with reliable and accurate emergency call services.<sup>15</sup> The suits to date have been resolved without any legal finding that MetroPCS has infringed any patent, and yet MetroPCS has paid a substantial price to defend and to be able to continue its E911 services. Certainly more E911 NPEs no doubt lie in wait and MetroPCS continues to brace itself for the next allegation to be introduced.

MetroPCS is further concerned that the E911 patent “two-step” is just the beginning. Wireless carriers have to comply with an ever increasing number of regulatory mandates. As carriers begin implementing next generation 911 services, designing products to enable persons with disabilities to access their the services, and take steps in compliance with CMAS, these NPEs will follow. In many cases, the NPEs torture patents into actions targeting Commission mandated services which have little to do with wireless or even the Commission’s required services as a way to extract tolls from the industry.<sup>16</sup> And, when this occurs, the public will continue to be harmed to the extent that carriers are forced to increase prices in order to defray the costs of vexatious litigation and unwanted licensing fees.

### **III. METROPCS SUPPORTS TCS’ REQUEST FOR PROMPT COMMISSION ACTION ON THIS ISSUE**

Under these circumstances, the important question raised by TCS bears repeating: does the FCC want to force wireless providers into the untenable position of choosing between complying with the Commission’s rules regarding public safety or being routinely prosecuted for

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<sup>15</sup> Indeed, the E911 patent infringement suit merry-go-round continues to spin, as MetroPCS is also embroiled in similarly-unfounded pending litigation.

<sup>16</sup> The Supreme Court has recognized that “[s]ome persons seem to suppose that a claim in a patent is like a nose of wax which may be turned and twisted in any direction, by merely referring to the specification, so as to make it include something more than, or something different from, what its words express.” *White v. Dunbar*, 119 U.S. 47, 51 (1886).

alleged patent infringement? The answer is no. In order to relieve E911 service providers and wireless service providers from being forced into this no-win conundrum, the Commission must take prompt action. MetroPCS agrees with TCS that Commission action needs to be taken in the near term to address this issue. TCS offers two possible solutions for the Commission's review. The first is the recommendation that the Commission modify its rules governing E911 and NG911 or publish guidance that states that E911 and NG911 location-based services compliance is "by or for" the government and with the Government's authorization and consent consistent with the language of 28 U.S.C. § 1498.<sup>17</sup> As a result of such guidance, the forum for litigation of patent rights claims related to mandatory obligations for E911 and future NG911 will be the U.S. Court of Claims.<sup>18</sup> The *Petition* stresses that by following this recommendation, the Commission will ensure that "compliance with E911 regulation and future NG911 regulations would not be unduly or inappropriately burdened by the potential or actual existence of patents relating to these regulations."<sup>19</sup>

In the alternative, TCS offers a second action for the Commission to take: "to require that current E911 and future NG911 patents be licensed subject to RAND terms and conditions" as such pricing is necessary to promote important Commission goals.<sup>20</sup> TCS shows that requiring intellectual property rights for E911 capabilities to be licensed on reasonable and non-discriminatory terms is appropriate to assure the unobstructed and reliable provision of E911 services.<sup>21</sup> MetroPCS submits that the Commission could grant both avenues of relief sought by

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<sup>17</sup> *TCS Petition*, 18-21; *see also* 28 U.S.C. § 1498(a).

<sup>18</sup> *TCS Petition*, 19.

<sup>19</sup> *Id.* at 21.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 22.

TCS. MetroPCS also submits that there are other ways for the Commission to play a useful role in the goal of reducing these suits and insulating the Commission's mandated services from infringement claims. Since the E911 mandated services typically are provided by carriers at no charge to the consumer, the Commission could find that the Commission mandated services result in no substantial economic benefit to the wireless carrier. This simple finding would encourage courts to dismiss damages claims by NPEs targeting a wireless carrier for providing Commission mandated services. By issuing a declaratory ruling that no revenues are derived from E911 services, the Commission would pull the "teeth" from the NPEs suits by eliminating this damage argument. If NPEs are unable to collect damages from Commission mandated services, then NPEs would have little incentive to bring claims against Commission mandated services.

Since the Commission is the expert regulatory agency mandating E911 service, it is clearly within the Commission's province to determine what revenue or value, if any, should be attributed to the provision of Commission mandated services. This measured approach would allow a patent holder to pursue relief on non-E911 claims. For example, if a patent claim reads on both E911 and other services (such as location services), the only service where damages would be limited is for the Commission mandated service. If a carrier decided to stop offering the non-Commission mandated service implicating the patent, its damages could be reduced to zero and the NPEs might dismiss the suit if there is no possibility of obtaining damages. The benefit of this approach is that there would be no claims that could be filed by a NPE anywhere to seek damages for the Commission mandated services – unlike TCS' proposal to have the infringement claims brought before the U.S. Court of Claims.

In addition, to cut off any possibility that a NPE might seek or obtain injunctive relief, the Commission should find that the public interest is not served when injunctive relief is granted to redress claims against Commission-mandated services like E911. Even without the possibility of damages, if a NPE can still hold the injunctive Sword of Damocles over the head of a wireless carrier, such possibly would allow NPEs to continue to extract unreasonable licensing fees from the industry. Again, the Commission clearly has the expertise and the authority to outline its view of where the public interest lies in the provision of the service and such an explication could tip the balance on any injunctive relief determination in favor of a court not granting injunctive relief.

A rulemaking proceeding would be useful to develop a full record regarding the prevalence in the market of predatory lawsuits, the availability, if any, of alternate E911 technologies that enable carriers to meet regulatory obligations without paying exorbitant licensing fees, the scope of the Commission's authority to bring NPEs to heel in this important public safety arena and the optimal way to exercise that authority. However, rulemakings take time and this is a pressing problem that calls out for immediate Commission action. To this end, the Commission should seriously consider issuing the declaratory rulings requested by TCS and MetroPCS that will assist defendants who are the targets of extortionary claims by NPEs in the ongoing court proceedings.

#### **IV. CONCLUSION**

Based on the foregoing reasons, MetroPCS asks the Commission issue a Declaratory Ruling that either E911 and NG911 location-based services compliance is "by or for" the government and with the Government's authorization and consent consistent with the language of 28 U.S.C. § 1498 or that no revenues or value should be attributed to Commission mandated

services and that the public interest in such services outweighs any private litigant's interest in injunctive relief.

Respectfully submitted,

MetroPCS Communications, Inc.



By:  
Carl W. Northrop  
Andrew Morentz  
Jessica DeSimone  
TELECOMMUNICATIONS LAW  
PROFESSIONALS PLLC  
875 15th Street, NW, Suite 750  
Washington, DC 20005  
Telephone: (202) 789-3120  
Facsimile: (202) 789-3112

Mark A. Stachiw  
General Counsel, Secretary  
& Vice Chairman  
Garreth A. Sarosi  
Deputy General Counsel  
MetroPCS Communications, Inc.  
2250 Lakeside Blvd.  
Richardson, Texas 75082  
Telephone: (214) 570-5800  
Facsimile: (866) 685-9618

Its Attorneys

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